

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

To be argued by
Irving Anolik

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Pof S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

LAWRENCE J. MITCHELL, et al.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT-APPELLANT'S BRIEF.

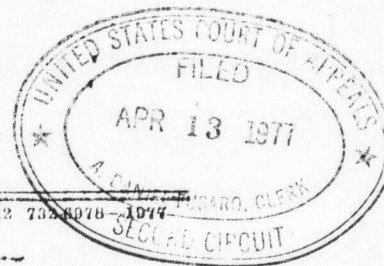
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 77-1085
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UNITED STATES OF AMERICA,

Appellee,

-against-

LAWRENCE J. MITCHELL, et al.,

Defendants-Appellants.
-----x

APPELLANT MITCHELL'S BRIEF

STATEMENT

Appellant LAWRENCE J. MITCHELL appeals from a judgment of the United States District Court for the Southern District of New York, rendered the 13th day of January, 1977, convicting him of two counts of violating 21 U.S.C. 812, after trial before Honorable Richard Owen and a jury. The Court imposed concurrent sentences of 12 years imprisonment on each count and MITCHELL is presently incarcerated.

STATEMENT OF THE ISSUES
AND
BACKGROUND OF THE CASE

There were a number of defendants convicted in a multi-defendant trial that at one time comprised 23 defendants who actually went to trial.

There are several points that we are advancing as to why the judgment of conviction should be reversed. We recognize that there are several other briefs that will be filed and we are trying to avoid duplicative material to the best of our ability. Necessarily, however, a certain degree of similarity among the various briefs will no doubt emerge since the joint trial presented a number of common issues.

A) Among the issues which we believe this Court should consider for reversal are the following:

1. MITCHELL was deprived of effective assistance of counsel for a period of his trial because of the fact that his lawyer, Sidney M. Offer, Esq., was mugged on July 17, 1976, suffering a fracture to a portion of his right hand. This was during the trial.

On August 31, 1976, while the trial was still in progress, counselor Offer had to undergo "major surgery"

because the fracture "opened". Mr. Offer continued as counsel, but because of what occurred, it is manifest that MITCHELL was not properly represented and, indeed, could not be properly represented. A letter dated January 15, 1977, from Sidney M. Offer, Esq., to the Chief Judge of this Court, contained the details of this problem, and it will be included in this brief.

2. MITCHELL was incriminated primarily upon the testimony of witnesses who themselves were incredible, namely Brown, Parker, and Ladd.

We recognize, of course, that a jury's verdict will not likely be disturbed by this Court, but this brings us to the next aspect of error.

3. It was impossible to have obtained a fair trial because of the massive amount of evidence and the numerous defendants who were thrown together to a point where it was impossible for a jury to properly assess the guilt or innocence of each of them.

We understand that another attorney for one of the other appellants will bring up the point that the Chairlady of the jury wrote a letter to Judge Owen,

and perhaps to this Court, indicating that proper deliberation and a proper verdict was impossible because of the massive trial which, coupled with its length, namely almost four months, rendered the constitutional right to a fair trial a mockery of justice.

4. MITCHELL was the victim of a massive and pervasive search of his premises, including the use of a vacuum cleaner, which revealed an infinitesimal trace of cocaine.

5. Testimony was adduced as well, that persons with whom the main witness, Jack Brown, had dealt, had been murdered, and evidence was also admitted that another Government witness, Parker, Brown's son-in-law, was in the Witness Protection Program because of threats.

6. During the trial an incident occurred which caused the Court to mysteriously remove one of the jurors and appoint an alternate. Unfortunately, no opportunity was given to counsel, so far as we know, to conduct a voir dire or to even know the reason for the removal of that juror, until after the event had become a fait accompli.

To this date, the writer of this brief, who, by coincidence, represented another defendant (Bernard Brightman), who was acquitted after a retrial because the jury had hung as to him, still does not know all of the details as to why the Trial Court was disposed to act ex parte and in such a clandestine manner.

We believe that since there was no consent to the removal of the juror and no opportunity was given to be heard thereon, that a mistrial automatically occurred.

7. Furthermore, there was not a single, but rather several, conspiracies which were established by the Government's testimony, if believed. Accordingly, the Court should have taken the case from the jury and dismissed the conspiracy count altogether.

B) We join in the briefs, and adopt the appendices of co-appellants. We shall not attempt to detail the facts of the case to any extent, but, instead, shall rely primarily upon the briefs of lead counsel who, we understand, will be going into the facts extensively.

Brown and MITCHELL had been friends. The former admitted that many transactions had nothing to do with narcotics (2331-2340)*. Brown conceded that he trusted MITCHELL and that there had been loan transactions between the two of them which had nothing to do with narcotics (2331, 2332).

The witness for the Government, Jack Brown, selectively seemed to remember what he wanted to and conveniently forget when it was favorable to the accused. It was only on cross-examination that he finally admitted that some of the transactions with L.J. MITCHELL were completely unrelated to narcotics.

We maintain that there was insufficient evidence to have submitted the case to a jury as against MITCHELL. The vice of the instant mass conspiracy trial, however, obscured this testimony which was adduced early in the trial and was no doubt either lost or confused in the minds of the jurors by the time the trial lumbered to its conclusion weeks later.

5-A.

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

Marion Ladd and Parker testified that they had had contacts with MITCHELL involving cocaine.

Parker stated that he had seen MITCHELL at Brown's house in Orangeburg, and Ladd testified that together with her boyfriend, Solon Glaze, MITCHELL had become involved in cocaine transactions.

The appellant herein, MITCHELL, had pleaded not guilty, thus denying all of the allegations, but did not himself take the stand in his own defense.

There was substantial testimony concerning transactions concerning defendants Alvarez and Rodriguez in Florida, others in Chicago and Washington, and MITCHELL and the remaining defendants in the New York area. There was also testimony that co-appellant Intersimone had dealt with Brown in heroin and not cocaine at all, but yet he was lumped into the same conspiracy.

Although the indictment alleged that the conspiracy began January 1, 1968, and lasted 'till April of 1976, there was nevertheless, substantial evidence

which predated January 1, 1968. This the Court nevertheless admitted, over objections.

A federal agent, Joseph Barbato, testified that he had gone to the MITCHELL house, together with certain other agents, where a search had been conducted. While there, he vacuumed substantial areas of the MITCHELL house and subsequently performed certain tests on the vacuumed material and asserted that contained therein were minute quantities of cocaine. The quantities, however, were of such a small quantity as to be virtually non-existent.

For example, Barbato testified that it was too small to even weigh and would be less than a pinhead in quantity. (5273-5277)*

He stated that he found such minute traces of cocaine that at most there would be about "one-thirty thousandth of an ounce". (5275) Barbato stated that his test revealed the presence of cocaine hydrochloride (5280).

7.

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

Barbato stated further that he did not see anybody vacuuming the straining apparatus and we submit that it is possible that his own equipment could have contained such a small residue and he might have improperly attributed it to MITCHELL.

We recognize, of course, on the other hand, that Brown, Parker, and Marion Ladd inculpated MITCHELL, but they were co-conspirators and accomplices whose credibility had been severely taxed and it might well be that the search and seizure and the chemist's testimony was the single factor that resulted in conviction.

MITCHELL by no means was denominated a prime culprit in the tapestry of conspiratorial activities which the Government wove over the three and a half to four months that the trial persisted.

We again advert to the fact that his lawyer, Sidney M. Offer, Esq., by his own admission, had been injured seriously, required a major operation during the trial, and even when in the courtroom, was wracked by pain and discomfort to a point where it seems obvious he must have been distracted. Appellant MITCHELL

obviously did not have a lawyer whose full attention could be paid to the case at hand.

POINT I

APPELLANT MITCHELL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY VIRTUE OF THE FACT THAT HIS LAWYER (SIDNEY M. OFFER) HAD BEEN CRIMINALLY ASSAULTED DURING THE TRIAL AND WAS REQUIRED TO UNDERGO MAJOR SURGERY AT A LATER POINT DURING THE TRIAL. HE WAS WRACKED WITH PAIN THROUGHOUT THE PROCEEDINGS AND OBVIOUSLY MITCHELL WAS, PRO TANTO, DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS TO COUNSEL. THE COURT SHOULD HAVE APPOINTED NEW COUNSEL AND IT SHOULD HAVE PERMITTED MR. OFFER TO WITHDRAW.

The Sixth Amendment of the United States Constitution guarantees to each defendant in a criminal case the assistance of counsel. This is not some idle phrase, but is a fundamental right.

In BRUBAKER v. DICKSON, 319 F.2d 30, 37, the Court noted:

"Due process does not require 'errorless counsel...but counsel reasonably likely to render and rendering reasonably effective assistance.'" (Emphasis ours)

See UNITED STATES v. HANDY, 203 F.2d 407; 23 C.J.S. Criminal Law §982(8).

GLASSER v. UNITED STATES, 315 U.S. 60, mandates that the Court protect this basic right. See GIDEON v. WAINWRIGHT, 327 U.S. 335.

The highest Court of New York proclaimed in *People v. Byrne*, 17 N. Y. 2d 209, 270 N. Y. S. 2d 193:

"The right to have the assistance of counsel was held to be too fundamental to made to depend upon nice calculations by courts of the degree of prejudice arising from the denial."

In *People v. Tomaselli*, 7 N. Y. 2d 350, 353, the Court held that counsel must be functioning adequately to protect and assist the accused, otherwise he has no counsel at all.

The Sixth Amendment requires that the right to effective counsel be protected and preserved. Nothing in *Farette v. California*, 422 U. S. 806, is to the contrary.

It must be borne in mind that MITCHELL is not a lawyer and there is some question as to what his level of intelligence is altogether. Certainly, however, his consent to have another attorney represent him, which other attorney already was representing another defendant

in the case, was wholly improper. Moreover, MITCHELL could not intelligently make a decision as to his waiver of Offer's presence since, in that regard, he was acting as his own lawyer and this was inconsistent with the commands of the Sixth Amendment.

The Court should have appointed an impartial attorney to advise him.

As was said in GLASSER v. UNITED STATES, supra, (315 U.S. at 75);

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretzke is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citations omitted]... Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel guaranteed by the Sixth Amendment. Id. at 75-76.

Offer was so disturbed over the fact that he was really unable to effectively represent his client during the trial, that in the highest traditions of fairness, he sent the Chief Judge of this Court the following letter:

SIDNEY M. OFFER
ATTORNEY AT LAW
415 LEXINGTON AVENUE
NEW YORK, N. Y. 10017

661-8464

January 15, 1977

Hon. Irving R. Kaufman
United States Court of Appeals
United States Court House
Foley Square
Manhattan, New York 10007

RE: U.S.A. vs Lawrence J. Mitchell

Dear Judge Kaufman:

I was appointed C.J.A. counsel to represent the above named defendant on May 20, 1976 and have been representing him since that date.

On November 12, 1976 defendant was after a 14 week trial, before the Hon. Richard Owen and a jury, convicted on two counts, Narc. 21, U.S.C. 812 and on January 13, 1977 sentenced to a prison term of 12 years on each count, to run concurrently. I filed a Notice of Appeal there from, on January 14, 1977.

The defendant stated on January 13, 1977, before Judge Owen, that he wished counsel other than the writer to represent him on his appeal. I join in that application, but for reasons other than those given by defendant.

On July 17, 1976 at 9:30 P.M. I was mugged at 51 Street off Park Avenue, Manhattan, N.Y. and suffered a fracture subluxation of the right finger of pip joint. I have had continuous medical treatment since that date. On August 31, 1976, the fracture opened and I was required to undergo major surgery at the Flower and Fifth Avenue Hospital by Dr. Carlos Z. Biscaro, of 1111 Park Avenue, Man., New York, 10028, and I still visit him and Dr. Max Miller an internist. On my release from the hospital, I continued at defendant's trial, in some pain and discomfort. My finger is bent and disfigured and will remain permanently so, and these events have had its toll on my nervous system. My physicians have recommended a lengthy recuperative vacation and since I am 73 years of age that seems like sound advice. Accordingly I am leaving for the islands of Granada, West Indies and Nevis, West Indies on January 17, 1977 and will return to New York on March 4, 1977.

SIDNEY M. OFFER
ATTORNEY AT LAW
415 LEXINGTON AVENUE
NEW YORK, N. Y. 10017

661-8464

Page 2
January 15, 1977

To: Hon. Irving R. Kaufman

Because of the necessity of a prompt appeal, it is requested that I be relieved as appeal counsel herein and that your honor appoint another attorney to represent Mr. Mitchell. I will of course, cooperate with such designated attorney, and will furnish him with the trial record and any other papers in my files.

My office has my detailed address in the Caribbean and will forward any response herein.

Respectfully yours,

Sidney M. Offer
Sidney M. Offer

CC: Hon. Richard Owen
Lawrence J. Mitchell
Asst. U.S. Attorney
Daniel Beller

POINT II

THE APPELLANT HEREIN WAS DEPRIVED OF A FAIR TRIAL BECAUSE OF THE INCLUSION OF SO MANY PEOPLE IN THE INDICTMENT AND TRIAL, THAT IT MADE A COMPLETE MOCKERY OF JUSTICE. NOBODY COULD EXPECT A FAIR TRIAL WITH SO MANY DEFENDANTS JOINED IN A SINGLE CASE.

There were numerous motions made for severance, but to no avail.

The forelady of the jury which, incidentally, deliberated for almost eight days, wrote a letter to the Trial Judge, and perhaps to others, indicating the impossibility and unfairness of asking lay jurors to render a fair verdict when so many people are included in an indictment and brought to trial thereon, particularly when the case itself persists for so many months and is encumbered by innumerable exhibits.

We maintain that a mass conspiracy trial at best is to be avoided. In the case at bar, however, since multiple conspiracies were proved, rather than a single conspiracy, it is obvious that there should have been severances granted and that a fair trial was wholly impossible.

There were, of course, instructions by the Trial Court to the jurors, that they should consider matters only subject to connection and that certain evidence was admissible against some defendants, but not others, and so forth.

Evidence was adduced against 30 co-conspirators and co-defendants and a great deal of hearsay was allowed.

"The naive assumption that the prejudicial effects can be overcome by instructions to the jury, . . . c.f., *Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." *KRULEWITCH v. UNITED STATES*, 336 U.S. 440, 453 (1949).

". . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) *NASH v. UNITED STATES*, 54 F.2d 1006, 1007 (CA 2, 1932).

In *KRULEWITCH v. UNITED STATES*, 336 U.S. 440, at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

"There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (Emphasis added)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to *HYDE v. UNITED STATES*, 225 U.S. 347 (1912), he said (at 452-3):

"Mr. Justice Holmes, on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as 'one of the wrongs that our forefathers meant to prevent.'"

In *KOTTEAKOS v. UNITED STATES*, 328 U.S. 750, 773 (1946), where, as here, a single conspiracy was alleged, but multiple conspiracies were proved, that Court, reversing for this reason, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass," and continued:

". . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

POINT III

THERE WERE MULTIPLE CONSPIRACIES
PROVED AND THE COURT SHOULD HAVE
DISMISSED THE INDICTMENT OR AT
LEAST HAVE GRANTED SEVERANCES.

In UNITED STATES v. BERTOLOTTI, 529 F.2d 149,
(2 Cir. 1975), this Court reversed a criminal case where
it was obvious that more than one conspiracy had been
established.

We recognize that very recently, in UNITED
STATES v. DE MICHAELS, [2 Cir. 1977, Docket No. 76-1335],
this Court affirmed a judgment of conviction where it
found that only substantive counts had been submitted to
a jury after the Trial Judge had dismissed the conspiracy
count because of multiple conspiracies having been proved.

We ask this Court to bear in mind that in the
case at bar Judge Owen did not dismiss the conspiracy
count and, therefore, we maintain he committed error.

See KOTTEAKOS v. UNITED STATES, 328 U.S. 750,
773-774, where the United States Supreme Court explained
that mass conspiracies trials ought to be avoided.

POINT IV

THE COURT REMOVED ONE OF THE JURORS WITHOUT CONSENT OF THE DEFENDANT DURING THE TRIAL AND WITHOUT AFFORDING ANY OPPORTUNITY TO CONDUCT ANY VOIR DIRE OR EVEN OBTAIN A REASON FOR ITS EXTRA-ORDINARY ACTIONS. THIS, WE MAINTAIN, PRECIPITATED AN AUTOMATIC MISTRIAL.

During the trial it appeared that something untoward had occurred with respect to one of the jurors. None of the counsel, at least none of the counsel representing MITCHELL, were apprised of the reasons until after the event had already occurred.

Even if it be assumed that there was good cause for the Court's actions, a fact we do not concede since no opportunity was given to any defense counsel, so far as we know, to conduct an interrogation prior to the event, the Court had no choice but to declare a mistrial.

In UNITED STATES v. ELLENBOGEN, 365 F.2d 982, 989 [2 Cir. 1966], cert. den. 386 U.S. 923, this Court held that consent of the parties is not required where substitution is for "reasonable cause". This, however, was not reasonable cause because there was no opportunity

on the part of MITCHELL to ascertain what the reason for dismissal was until after it had occurred, and to this day the events are shrouded in mystery. (See UNITED STATES v. GOLDBERG, D.C. Pa. 196 , 206 F.Supp. 394, aff'd. 330 F.2d 30, 41-43, [3 Cir. 1964], cert. den. 377 U.S. 953.

POINT V

THE DEFENDANT-APPELLANT WAS DEPRIVED OF A FAIR TRIAL, IN ADDITION TO THE FOREGOING REASONS, BECAUSE OF THE ADDUCTION OF EVIDENCE AS TO KILLINGS OF PERSONS WHOM THE GOVERNMENT WITNESS, BROWN, HAD DEALT WITH AND BECAUSE OF THE EVIDENCE THAT PARKER WAS IN THE FEDERAL PROTECTION PROGRAM AND THAT THREATS HAD BEEN MADE. THIS WAS EXACERBATED WHEN, FOLLOWING THE MYSTERIOUS REMOVAL OF A JUROR, THE TRIAL JURORS WERE ESCORTED UNDER GUARD TO AND FROM THE COURTHOUSE THEREAFTER.

We have already mentioned the fact that a trial juror was removed under mysterious circumstances, without the consent of MITCHELL and without any opportunity to be heard or to conduct a voir dire.

Certainly the Court should have permitted counsel to present arguments before removing a juror. We maintain,

as we have already explained supra, that a mistrial automatically resulted.

In any event, the testimony at trial that Parker was fearful and was in the Federal Protection Program, that several people with whom Brown dealt had been murdered, and that he, too, was in protective custody, all preclude a fair trial because of the extraneous nature of these aspects of the case.

The jurors undoubtedly became more apprehensive when one of their number was mysteriously removed and thereafter they had to be conducted to and from the courthouse in the custody of Marshals.

POINT VI

THERE WAS INSUFFICIENT EVIDENCE
TO HAVE WARRANTED THIS CASE BEING
PRESENTED TO A JURY AS TO MITCHELL.
THE COURT SHOULD HAVE GRANTED THE
MOTION TO DISMISS. AT MOST, MITCHELL
WAS A "CASUAL FACILITATOR".

The role of MITCHELL was described by three accomplices and co-conspirators - Brown, Parker, and Ladd. This was coupled with some incredible evidence as to the discovery of infinitesimal amounts of cocaine hydrochloride in his home after a search, using a vacuum cleaner.

Even if we believe Ladd and the others, it appears that MITCHELL was not a participant in the instant conspiracy, but was at most a casual facilitator therein.

In UNITED STATES v. HYSOION, 448 F.2d 343, at 347, this Court explained:

"We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere casual facilitator' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' United States v. Agueci, 310 F.2d 817, 828 (2 Cir. 1962), cert. denied, Guippone v. United States, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud." \

In UNITED STATES v. TAYLOR, (2 Cir. 1972), 464 F.2d 240, this Court overruled the so-called "Second Circuit Rule" first enunciated by Judge Learned Hand in UNITED STATES v. FEINBERG, 140 F.2d 592, 594. In TAYLOR, this Court stated, inter alia, in 464 F.2d at 242: .

"It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence § 2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1874] L.R. 7 H.L. 213, 233:

[A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?

It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

In UNITED STATES v. PEONI, 100 F.2d 401 at 403,, (2 Cir. 1938), Judge Learned Hand wrote "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

In UNITED STATES v. ANDOLSCHEK, 142 F. 2d 503, 507 (2nd Cir. 1944):

"It is true that at time courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error; the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime". (emphasis ours.)

The prosecutor used the vehicle of conspiracy to try to admit evidence that otherwise could not be admitted. Thus in UNITED STATES v. FALCONE, 109 F. 2d 579 (2nd Cir. 1940, Aff'd. 311 U. S. 205 (1940), Judge Learned Hand aptly declared (id 581):

"[The accused] must in some sense promote their venture himself, make it his own, have a stake in its outcome"

Then he cautioned the Courts and prosecutors (id 581):

" . . . today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictment that they can be avoided".
(emphasis ours.)

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Defendant-Appellant
Lawrence J. Mitchell.

APR 12 1937
U.S. DEPT. OF AGRICULTURE
WASHINGTON, D.C.